IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

LRs. Of Brijmohan.
vs.
Krishangopal Heda and others.

S.B.CIVIL SECOND APPEAL NO.254/2006 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 18.1.2006 PASSED BY SHRI YASHPAL SINGH CHOUDHARY, ADDITIONAL DISTRICT JUDGE NO.2, JODHPUR IN CIVIL APPEAL DECREE NO.100/1994.

DATE OF JUDGMENT ::: 13.12.2007

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr.H Maheshwari, for the appellant.
Mr.RR Nagori, for the respondents.

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BY THE COURT:

Heard learned counsel for the parties.

The appellant is aggrieved against the appellate judgment and decree dated 18.1.2006 by which the first

appellate court reversed the judgment and decree of the trial court dated 5.8.1993 and passed the decree for eviction of the appellant holding the appellant's predecessor, Brijmohan, to be tenant.

The plaintiff filed suit for eviction on the ground that he is owner of the property by virtue of gift deed dated 31.10.1972 executed by one Smt. Champa Bai w/o late Ram Chandra Chandak. Champa Bai was sister of plaintiff's mother. It is alleged that original defendant Brijmohan was in occupation of some part of the property as tenant of Champa Bai. The suit was filed after notice to the defendant for eviction. The defendant submitted an application under Order 6 Rule 5 CPC for getting further and better particulars with respect to the fact mentioned in the gift deed dated 31.10.1972 executed by Champa Bai because of the reason that there is mention of name of two tenants in the gift deed and thereafter, it has been mentioned that executant Champa Bai's sister's son is residing in the half portion of the property in dispute. The defendant sought to obtain particulars about the person who was described as Champa Bai's sister's son.

It appears from the order of the trial court dated 19.5.1984 that the trial court instead of rejecting application or directing the plaintiff to furnish further and better particulars, after perusing the gift

deed observed that the gift deed is dated 31.10.1972 and as per the plaintiff's case, the defendant is in occupation as tenant from 21.11.1972 which is after execution of the gift deed. Therefore, the plaintiff is the sister's son of donor Champa Bai. With these observations, the trial court ordered that there is no need to obtain further and better particulars from the plaintiff.

It will be worthwhile to mention here that under Order 6 Rule 5 CPC, the Court could have asked the plaintiff to furnish further and better particulars but instead of doing so, the Court itself virtually decided one contentious issue. Be it as it may be, the order dated 19.5.1984 has not been challenged by any of the parties. However, in the written statement, the defendant took a plea on the basis of the said order and submitted that there is contradiction in the pleadings of the plaintiff and the order dated 19.5.1984. The defendant's stand in the written statement was that the property in question was belonging to one Laxman Chandak who had two sons – Girdhari Ram and Ganga Ram. Girdhari Ram had one son Shiv Karan who had three sons – Ramchandra, Ramkaran and Udairaj. Shivkaran's son Ramchandra was adopted by Ganga Ram. Ramkaran died issue less and Udairaj had one daughter Ramkanwari and defendant Brijmohan was the son of said daughter Ramkanwari and thereby, he is

successor in interest in the property of Laxman Chandak and in occupation of property as co-owner. Defendant Brijmohan was never the tenant of Champa Devi.

The trial court dismissed the suit of the plaintiff holding that the plaintiff failed to prove that defendant Brijmohan was tenant of Champa Devi or of the plaintiff. It will be relevant to mention here that the most important evidence produced by the plaintiff in support of his plea that the defendant Brijmohan was tenant in the suit premises, was the reply to the notice given by Brijmohan through his advocate Shri M.D. Boob on 6.9.1978 wherein defendant Brijmohan admitted himself to be tenant of Champa Bai at the rent of Rs.12/- per month and he disputed the claim of Champa Devi that the rent is Rs.25/- per month. In the notice, he also admitted that he paid rent beyond Sawan Wadi Ek of samwat year 2003 as stated by deceased Champa Devi in her notice sent through advocate. This reply in original was produced in the rial court by the plaintiff and marked as Ex.8.

When the plaintiff tried to give evidence on this reply Ex.8 in his evidence on 4.9.1991, an objection was raised by the counsel for the defendant on the ground that to prove relevant issue, burden is upon the defendant and, therefore, this alleged reply to notice can be exhibited only in rebuttal evidence. It appears that said objection was allowed by the trial court and

the plaintiff was not allowed to tender the said reply to notice in evidence. Not only this, but when the defendant's/appellant's evidence was closed by the trial court on 11.1.1993 and fixed the case for final hearing, the appellant submitted an application seeking permission to produce more witnesses. The appellant's said application was dismissed by the trial court vide order dated 23.3.1993. The defendant/appellant to challenge said order dated 23.3.1993, preferred SBC Revision Petition No.209/1993 before this Court wherein the appellant obtained interim order from this Court whereby this Court directed the trial court to allow the defendant Brijmohan to produce three witnesses including the witness Advocate Murlidhar Boob, who gave reply to the notice of Smt. Champa Devi and wherein there is admission of defendant Brijmohan that he is tenant of Smt. Champa Devi. The revision petition no.209/1993 was dismissed by this Court on 4.4.1997 as infructuous on the statement of learned counsel for the appellant that the revision petition has become infructuous because the main suit itself has been decided by the trial court by that time and before the revision could have been decided by the High Court.

The above facts were very much relevant because of the reason that the appellant has raised this ground that the plaintiff should have produced as his witness advocate Shri M.D. Boob to prove the defendant's reply

to the notice of the plaintiff (Ex.8).

Learned counsel for the appellant submitted that when it is proved fact from evidence that Brijmohan was the successor in interest of the property in dispute of Laxman Chandak through his mother Ram Kanwari and Ram Kanwari's father Udairaj was son of Girdhari Ram, who in turn was son of Laxman Chandak, therefore, deceased Brijmohan and his successor are co-sharer in the property in dispute and could not have been tenant. Learned counsel for the appellant further vehemently submitted that even if inadvertently Brijmohan himself has accepted himself to be tenant of Champa Devi, then also his property right cannot be affected. It is also submitted that there was no specific ground taken by the plaintiff in his plaint for seeking eviction of defendant Brijmohan on the ground of denial of title and the appellate court had decreed the suit of the plaintiff on the basis of denial of title also.

I considered the submissions of learned counsel for the appellants and perused the reasons given by the two courts below in the impugned judgments as well as the record.

The first contention of learned counsel for the appellant that it was the duty of the plaintiff to

prove the reply to the notice alleged to have been given by defendant Brijmohan through his advocate to deceased Champa Devi's advocate and the Ex.8 in fact has not been proved is concerned, that plea is devoid of any force in law. Ex.8, reply to notice, alleged to have been given on behalf of the defendant has been sent through his advocate and bears the signature of the defendant's advocate. Said reply was sent in inland letter which bears the postal seal over it and the plaintiff stated that he received this reply by post. When the reply to the notice received by the plaintiff is in ordinary course of transaction through post, then he could have produced the document by tendering it in evidence. Upon his tendering in evidence, the burden stands discharged and onus shifted upon the defendant to rebut that evidence and for that, apart from his own statement, the best witness was advocate, under whose signature the reply was given. Even if the defendant's contention is that advocate Shri M.D. Boob was not his advocate nor he was authorised to send reply to the plaintiff's notice, then also he would have been an independent person who would have certainly deposed that the reply in original produced by the plaintiff was not given by the learned counsel on behalf of the defendant. The plaintiff could not have produced the person for whom the plaintiff says that he is the advocate of the defendant. In Civil Courts, the issues

are decided on the basis of not only direct evidence but on the basis of preponderance of probabilities. Because of this reason only, the burden of proof has two facets – one proving the fact and shifting onus upon other party to disprove the fact. In this case, admittedly, the defendant himself during the course of statement of plaintiff, raised objection that when the burden to prove one of the issue is upon the defendant, then the plaintiff can get the reply to the notice exhibited in rebuttal to that evidence and the defendant himself obtained order and permission from this Court to produce advocate Shri M.D. Boob as his witness, he cannot say that the plaintiff should have produced the advocate which the plaintiff's says was the advocate of the defendant. Otherwise also, in the facts of the case, it was the duty of the defendant to produce advocate Shri M.D. Boob as his witness.

In view of the above reason, reply to notice (Ex.8) which was received by the plaintiff in the ordinary course of transaction and through post which bears the address of the learned counsel of deceased Champa Bai – plaintiff's predecessor in title and bears the address of the learned counsel for the defendant, the plaintiff is bound by the contents of the notice wherein he admitted himself to be the tenant of Smt. Champa Devi.

The trial court by ignoring the order of this

Court passed in revision petition no.209/1993 committed error of law in holding that the plaintiff should have produced witness – advocate Shri M.D. Boob. In view of unequivocal admission of the defendant in the reply to the notice of Champa Devi, the defendant was estopped from challenging his relationship with Champa Devi as landlord and tenant.

There is no force in the submission of learned counsel for the appellant that if anybody inadvertently admits himself to be tenant of other and is in fact owner of the property, then he cannot loose his property right. The present case was filed by the landlord on the basis of his relationship with the defendant as tenant and in this case, the question of title was absolutely irrelevant. Even a true owner can be tenant in his own premises in certain circumstances and unless the defendant Brijmohan would have been successful in explaining his admission made in the reply to notice or could have brought on record any circumstance on the basis of which, he could have proved the admission to be not of his own or patent wrong, he is bound by his admission. There is no explanation even for namesake to suggest that the admission in the reply Ex.8 was a mistake committed by the defendant. Once the defendant took the stand that he did not engage the counsel for giving reply to the

notice, then on proof of the reply to be from the defendant, the defendant is bound by the contents of the reply sent on his behalf. The abstract plea that the defendant who was owner of the property as co-sharer could not have admitted himself to be tenant cannot be accepted in view of his unequivocal admission in the reply to notice and further in absence of any evidence with respect to the admission to be wrong.

From the above discussions, it is clear that the appellate court rightly held the defendant Brijmohan to be tenant of deceased Champa Devi and Champa Devi executed a gift deed in favour of the plaintiff and, therefore, the plaintiff became owner of the property by virtue of that gift and stepped in the shoes of landlord and was entitled to decree for eviction of the appellant/defendant on all the grounds including the ground of denial of title.

So far as the contention of learned counsel for the appellant that the plaintiff had not taken a ground namely, denial of title as ground for eviction in the plaint is concerned, that is also devoid of any force in view of the fact that when the defendant denied the title of the plaintiff and Smt. Champa Devi and renounced his character as tenant, then in rejoinder to the written statement, plea was taken and the trial court framed the issue and both the parties led

evidence on that issue. Therefore, the defendant was fully aware about the entire case of the plaintiff for seeking the decree eviction on the ground of denial of title and the appellant cannot now challenge the finding after taking chance to prove and disprove the relevant issue of denial of title framed by the courts below.

In view of the above reasons, I do not find any substantial question of law involved in this appeal. Consequently, this second appeal, having no merits, is hereby dismissed.

(PRAKASH TATIA), J.

S.Phophaliya